83-1404

No. ——

IN THE

Supreme Court of the United States

October Term, 1983

VINCENT CHARLES PITEO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BARRY IVAN SLOTNICK
ROGER J. SCHWARZ
Attorneys for Petitioner
225 Broadway, Suite 2100
New York, New York 10007
(212) 964-3200

Questions Presented

1. Can the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* ("the Act") be construed so that the government, by adding a new defendant to a case, by obtaining a superseding indictment, at a time when the seventy (70) day period mandated by the Act has nearly expired as to an originally indicted defendant, unduly prejudices such original defendant because his speedy trial time is tolled until the new defendant's motions are heard and determined?

2. Whether the District Court unduly prejudiced petitioner, in violation of the Act, by charging to him, one-hundred-twenty-two (122) days of "excludable time" to determine a motion to suppress, where such time and the resultant delay were occasioned by a co-defendant's failure to submit a post-hearing Memorandum of Law, which was due seven (7) days after the hearing had been concluded.

The Parties Below

Petitioner was initially named together with Lewis Edward Wright in an indictment filed in the United States District Court for the Southern District of New York, that charged offenses under 18 U.S.C. §§ 371, 659 and 2315.

A superseding indictment charged petitioner and Wright with the same offenses and added Mildred Piteo, petitioner's sister, as a co-defendant. She was further charged with a violation under 18 U.S.C. § 1001.[1]

1. At a joint trial before the Honorable Kevin T. Duffy and a jury, Wright was acquitted. Mildred Piteo was convicted and was sentenced to a term of probation. Vincent Piteo was also convicted, and was sentenced to three concurrent, three-year terms of imprisonment.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Vincent Charles Piteo ("Piteo") petitions for a Writ of Certiorari to review an order of the United States Court of Appeals for the Second Circuit which affirmed findings made by the United States District Court for the Southern District of New York, after remand from the Court of Appeals.

Orders Below

An unpublished memorandum opinion and summary order were issued by the United States Court of Appeals for the Second Circuit on October 4, 1982. In that memorandum and order, the Court of Appeals affirmed the judgment of the United States District Court for the Southern District of New York in part, and remanded the case to the District Court in part to allow the District Court to make

additional findings with respect to the speedy trial issue raised by petitioner.

The Court of Appeals issued a published opinion and order dated December 21, 1983 which affirmed the findings made by the District Court after remand. That opinion was not yet officially reported as of the date of this Petition.

The initial memorandum and order of the Court of Appeals as well as the published opinion of that Court rendered after remand are set forth in the Appendix at pages 1a and 10a, respectively.

Jurisdiction

The order of the Court of Appeals affirming the findings and order of the District Court after remand was dated and entered on December 21, 1983.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

Constitutional Amendments Involved

Amendment VI—Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes Involved

18 U.S.C. § 3161

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

• • •

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

• • •

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

• • •

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

• • •

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

• • •

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

• • •

18 U.S.C. §3162(a)(2)

§ 3162. Sanctions

(a)(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on

the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

18 U.S.C. § 371 Conspiracy to commit offense or to defraud United States

18 U.S.C. § 659 Interstate or foreign shipments by carrier; State prosecutions

18 U.S.C. § 2315 Sale or receipt of stolen goods, securities, monies or fraudulent State tax stamps

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

• • •

Rule 48(b), Federal Rules of Criminal Procedure

Rule 48. Dismissal

(b) By Court. If there is unecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Statement of the Case

A. The Case in the District Court

Petitioner and a single co-defendant, Lewis Wright, were indicted in the Southern District of New York on September 19, 1980 for violations under 18 U.S.C. §§ 371, 659 and 2315. Under the Speedy Trial Act, petitioner's speedy trial time began to run as of that date.[2]

On October 17, 1980, during a pre-trial conference with the District Court, petitioner, through counsel, consented on the record, to waive *some* of his speedy trial time upon the understanding that a trial date of December 15, 1980 would be fixed by the Court. On November 17, 1980, petitioner timely filed pre-trial motions, including a motion to suppress physical evidence.

On November 19, 1980, the government filed a superseding indictment which added Mildred Piteo as a co-defendant.[3] The superseding indictment charged the identical offenses as the original indictment had alleged against petitioner, and did not prompt him to file any further pre-trial motions.[4]

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2. A complaint was filed in the District Court on August 30, 1980 and petitioner was arraigned that day. Under 18 U.S.C. § 3161 (c)(1), a defendant's trial must begin within seventy (70) days of an indictment or first appearance before a judicial officer, whichever occurs later.

3. Arraignment on the superseding indictment took place on November 21, 1980.

4. Petitioner did file some supplemental papers, the last one having been docketed on January 30, 1981.

On March 10, 1981, some 110 days after petitioner had filed his pre-trial motions, the Court commenced an evidentiary hearing upon the application to suppress.[5] The hearing was continued for some 55 days, to May 4, 1981, at which time it was concluded.[6] Petitioner filed a post-hearing Memorandum of Law on May 29, 1981.[7] Petitioner's co-defendant never filed a further Memorandum of Law although her attorney expressed his intention to do so at the conclusion of the hearing. The official docket sheet entry in the District Court for May 4, 1981 indicates unequivocally that the Court noted on that day, the beginning of a 30-day, "excludable" speedy trial period while the motion was "actually under advisement", pursuant to (then) 18 U.S.C. § 3161(h)(1)("G") (now "J") (*see*, Appendix at p. 45a).

On September 3, 1981, another 122 days later, without having extended the 30-day "excludable period" that commenced to run on May 4, 1981,[8] the District Court filed a memorandum opinion and order denying petitioner's motion to suppress.

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5. Petitioner's co-defendant, Mildred Piteo, joined in the motion to suppress.

6. The long adjournment was apparently occasioned by the engagement of petitioner's co-defendant's counsel.

7. Upon conclusion of the hearing, the Court requested that any further submissions be made by May 11, 1981. Although petitioner's final papers were filed several days after the date fixed by the Court, the motion was fully and finally submitted, on his behalf, as of May 29, 1981.

8. The Court, upon making proper findings, could, perhaps, have continued the matter, in the interests of justice, pursuant to 18 U.S.C. § 3161(h)(8). It did not do so, nor did it deal in any way with the inaction of petitioner's co-defendant's counsel in not filing a further Memorandum, notwithstanding the fact that petitioner's motion had been fully and finally submitted on May 29, 1981.

On September 15, 1981, petitioner's co-defendant, Lewis Wright, filed a motion to dismiss pursuant to the Speedy Trial Act. Petitioner timely joined therein. The District Court denied the motion to dismiss, without opinion or elaboration, on September 28, 1981, the date on which trial commenced.

On October 13, 1981, the jury returned a verdict convicting petitioner on three counts and acquitting him on one.

Petitioner took a direct appeal to the Court of Appeals which, in a summary order, affirmed the judgment of conviction in part and remanded the case in part to permit the District Court to make further findings with respect to the speedy trial issue.

B. The Proceedings on Remand

On remand, in a six-page Memorandum filed on April 28, 1983, the District Court made further findings with respect to its calculations of time pursuant to the Speedy Trial Act. The District Court held that the filing of the superseding indictment, which for the first time named petitioner's sister, Mildred Piteo, as a co-defendant, triggered one of the "exclusions" provided in 18 U.S.C. § 3161(h)(7), which allows for a "reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run." The Court reasoned further that in computing the Speedy Trial time for petitioner, it first had to determine Mildred Piteo's Speedy Trial time and then determine if the resultant delay affecting petitioner was "reasonable".

The District Court found that Mildred Piteo went to trial 311 days after entry of her plea of not guilty, a period plainly in violation of the Speedy Trial Act mandate that one must be brought to trial within seventy (70) days unless certain intervening time is properly excludable under the statute, 18 U.S.C. § 3161(c).

The trial court held that the entire period of time from the date on which Mildred Piteo filed her pre-trial motions, December 13, 1980, through the date on which a decision was rendered on the motion to suppress—a period of 264 days—was excludable under 18 U.S.C. § 3161(h)(1)(F) and (J). The court reasoned that by virtue of the fact that petitioner's co-defendant, Mildred Piteo, never submitted a post-hearing Memorandum, the motion could not be "under advisement", subject to the Act's thirty (30) day limitation, 18 U.S.C. § 3161(h)(1)(J).[9] The Court reached this result notwithstanding the fact that it had directed that all post-hearing submissions be made by May 11, 1981, seven (7) days after the conclusion of the hearing.

Having reached such a conclusion with respect to petitioner's co-defendant, the District Court held with respect to petitioner, that:

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9. We note again that the official Docket entry in the District Court unequivocally reflects that the motion was "under advisement" for a 30-day period commencing on May 4, 1981, pursuant to (then) 18 U.S.C. § 3161(h)(1)(G) (now [J]).

We note further that the District Court's own opinion noted, at page 5 thereof, that the exclusion was due, in part, at least, to 18 U.S.C. § 3161(h)(1)(J), the 30-day "actually under advisement" provision (*see*, Appendix at p. 8a).

The District Court further noted, citing *United States* v. *Bufalino*, 683 F.2d 638 (2d Cir. 1983), *cert. denied*, 103 S. Ct. 727 (1983) that the government should, in the future, bring to the Court's attention, a defendant's failure to respond to a motion within a reasonable period of time.

> . . . it would be anomalous to hold now that the delay of trial for less than two [further] months to allow for a joint trial with his co-defendant sister was unreasonable. It is also significant that Vincent Piteo never moved for a severance . . . (opn. of the District Court, p. 6)[18] (*see*, Appendix at page 9a)

Reasons for Granting the Writ

Central to the determination of the Court of Appeals in this case, after remand, was its observation,

> . . . in cases involving multiple defendants only one speedy trial clock, beginning on the date of the commencement of the speedy trial clock of the most recently added defendant, need be calculated under 18 U.S.C. § 3161(h)(7) [citing, *United States* v. *Barton*, 647 F.2d 224, 229 n.5 (2d Cir. 1981), *cert. denied*, 454 U.S. 857 (1981), slp. opn. at p. 696] (Appendix at page 15a)

Several other Circuits appear to be in accord with the view that at least under 18 U.S.C. § 3161(h)(7), and in the absence of a severance, an exclusion under the Speedy Trial Act applicable to one defendant applies to all defendants. See, *United States* v. *Novak*, 715 F.2d 810 (3d Cir. 1983); *United States* v. *Edwards*, 627 F.2d 460, 461 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 872 (1980); *United States* v. *Struyf*, 701 F.2d 875, 878 (11th Cir. 1983); *United States* v. *Stafford*, 697 F.2d 1368, 1372 (11th Cir. 1983); *United States* v. *Fogarty*, 692 F.2d 542, 546 (8th Cir. 1982), *cert.*

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10. The belated suggestion that petitioner could have moved for a severance, we respectfully submit, implies a burden on a defendant which the Speedy Trial Act does not impose.

Moreover, seeking a severance might have been ill-advised for other reasons. Most significantly, the legislative history of the Act makes it plain that Congress viewed severances with disfavor.

denied, 103 S. Ct. 1434 (1983); *United States* v. *Mitchell*, —— F.2d —— (1st Cir. 1983) (Docket No. 82-1930, 12/29/83). The Fourth, Fifth, Sixth,[11] Seventh, Ninth and Tenth Circuits do not appear ever to have addressed the issue.

Significantly, the line of cases that sanctions the application of an exclusion that applies to one defendant to all co-defendants does not, with one possibly distinguishable exception,[12] concern situations where the delay has been occasioned by the *government's* inclusion, at a later time, of additional co-defendants in a superseding indictment.

We respectfully submit that this is a consideration of vital importance, since obtaining a superseding indictment is an act giving rise to delay initiated by the government rather than by a co-defendant. As such, there is a potential for the government frustrating the salutary purposes of the Speedy Trial Act. Faced with a Speedy Trial deadline the government could merely supersede to add an additional defendant and thereby "reset" the speedy trial clock to the detriment of all other co-defendants.[13] The joining of an additional defendant in a superseding indictment, at the instance of the government, with its potential for delaying an entire multiple defendant case, cannot, we respectfully submit, be analyzed in the same manner as the

11. The position of the Sixth Circuit on this question is not entirely clear. See, *United States* v. *Williams*, 711 F.2d 748 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 433 (1983).

12. *United States* v. *Novak*, *supra*, 715 F.2d 810 (3d Cir. 1983).

13. We do not mean to suggest that the government would regularly abuse such circumstances, but the example, we urge, illustrates the significant problem raised by such an approach.

various other delays contemplated in subsection (h)(1) of the Act, yet the cases do not seem to draw the necessary distinction.[14]

Even assuming that in a multiple defendant prosecution, the speedy trial clock of the most recently joined defendant governs as to all others, there remain substantial questions as to how long a delay was "reasonable" under 18 U.S.C. § 3161(h)(7) in the facts and circumstances of the instant case and how the other exclusions in the Speedy Trial Act should be applied.

In *United States* v. *Cobb*, 697 F.2d 38 (2d Cir. 1982), the Second Circuit, in considering and applying 18 U.S.C. 3161 (h)(1)(F) and (J), concluded that the two subsections, (F) and (J), had to be read in conjunction with each other. Citing the legislative history, the Court noted:

> . . . Congress intended that the time between making the motion and finally submitting it to the court be governed by (F), and that the time during which the court has the motion "actually under advisement" be governed by (J). [citing, *United States* v. *Bufalino*, *supra*, 683 F.2d 639 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 727 (1983)] . . .
>
> . . . (J)'s exclusion would ordinarily begin when the delay authorized by (F) ceased . . . If they [motions] require more time, up to 30 days may be automatically excluded under (J), and if more than 30 days are needed for proper decision on a difficult motion, an "ends of justice" continuance under (h)(8) is avail-

14. Indeed, the statute appears to draw such a distinction; subsection (h)(7), which appears to speak to joinder of additional defendants, allows a delay in such situations, but mandates that the period of delay be "reasonable." The cases decided under the Act do not address the reasonableness requirement of subsection (h)(7).

> able on proper findings [footnote omitted] . . . it is clear that Congress' use of the term "other prompt disposition" did not refer to a decision made after having the matter "actually under advisement" under (J). Rather, the "disposition" referred to is the point at which the matter is presented or submitted to the court for decision . . .
>
> . . . the Committee [did not] intend that additional time be made eligible for exclusion by postponing the hearing date or other disposition of the motions beyond what is reasonably necessary . . .
>
> . . . Under this view, *long postponements of hearing dates* unless reasonably necessary *would not qualify as excludable time, nor would unreasonably long extensions of time for the submission of papers . . . United States* v. *Cobb, supra,* 697 F.2d 38, 44 (2d Cir. 1982) [citing S. Rep. No. 96-212, 96th Cong., 1st Sess. 34 (1979)]. (emphasis supplied)

Applying the foregoing, it is respectfully submitted that the Second Circuit applied a strained analysis to petitioner's case to arrive at the conclusion that his rights under the Speedy Trial Act were not violated because inaction on the part of his co-defendant in failing to file a further Memorandum of Law prevented the suppression motion from ever being "under advisement" under § 3161(h)(1)(J).[15]

That the Courts of Appeals are not at all in accord as to the proper application of the exclusions embodied in 18

15. The instant case is factually distinguishable from *United States* v. *Bufalino, supra,* 683 F.2d 638 (2d Cir. 1982), *cert. denied,* 103 S. Ct. 727 (1983). There, the defendant and not a co-defendant failed altogether to make his position known on a government motion to sequester, and the Court of Appeals therefore rejected his claim under the Speedy Trial Act. Here, of course, petitioner timely made his position known to the District Court.

U.S.C. § 3161(h)(1)(F) and (J) is, we respectfully submit, abundantly clear. *See, United States* v. *Mitchell, supra,* —— F.2d —— (1st Cir. 1983) (Docket No. 82-1930, 12/29/83) ("The problem with this language is that it contains no time limits for hearing pretrial motions and acting on them. The reference to 'other prompt disposition' is hortatory only"); *cf., United States* v. *Stafford, supra,* 697 F.2d 1368, 1373 & n.4 (11th Cir. 1983) (period from filing to conclusion of hearing is automatically excluded "without qualification"); see also, *United States* v. *Campbell,* 706 F.2d 1138, n.12 (11th Cir. 1982); *but see, United States* v. *Novak, supra,* 715 F.2d 810, 820, *supra* (3d Cir. 1983) (under § 3161[h][1][F], permissible exclusions applicable to pre-trial motions begin with the filing of a motion and run only "for a period of time that is 'reasonably necessary' to conclude a hearing or to complete the submission of the matter to the Court") (citing, *United States* v. *Cobb, supra,* 697 F.2d 38 [2d Cir. 1982]); *cf., United States* v. *Fogarty, supra,* 692 F.2d 542, 545 (8th Cir. 1982), *cert. denied,* 103 S. Ct. 1434 (1983) (Section 3161[h][1][F] clearly requires automatic exclusion of the period during which pre-trial motions were continuously pending); *but see, United States* v. *Williams, supra,* 711 F.2d 748, 751 (6th Cir. 1983), *cert. denied,* 104 S. Ct. 433 (1983) (delay during pendency of motions may, under some circumstances, constitute a denial of the right to a speedy trial).

It is respectfully submitted that there is a lack of uniform interpretation of the Speedy Trial Act's provisions pertaining to "excludable time" among the federal Courts of Appeals. Moreover, the Supreme Court has never settled the important questions of federal statutory con-

struction under 18 U.S.C. § 3161, *et seq.*, raised in the instant Petition.

It is further respectfully submitted that the application and construction of the Speedy Trial Act, an intrinsically complex federal statute, enacted to safeguard criminal defendants' rights under the Sixth Amendment to the United States Constitution,[16] are matters of fundamental importance to the fair and proper administration of criminal justice in the United States Courts.

Conclusion

It is respectfully submitted that Vincent Charles Piteo's Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
February 21, 1984

Respectfully submitted,

Barry Ivan Slotnick
Roger J. Schwarz
Attorneys for Petitioner,
Vincent Charles Piteo
225 Broadway, Suite 2100
New York, New York 10007
(212) 964-3200

16. *See, United States* v. *MacDonald*, 102 S. Ct. 1497, 1501 n.7 (1982).

APPENDIX

Decision of the United States Court of Appeals for the Second Circuit, Dated October 4, 1982, Remanding the Case for Further Findings on Speedy Trial Issue

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of October, one thousand nine hundred and eighty-two.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE JAMES L. OAKES
HONORABLE RALPH K. WINTER
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES OF AMERICA,
Appellee,

v.

VINCENT CHARLES PITEO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the trasncript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is Affirmed in part and Remanded to the district court in part.

Vincent Charles Piteo appeals from a judgment of conviction entered on March 22, 1982, in the United States District Court for the Southern District of New York, Kevin J. Duffy, J. Appellant was found guilty, after a trial by jury, of one count of conspiring to receive stolen property in interstate commerce, 18 U.S.C. § 371, and two substantive counts of violating 18 U.S.C. § 659 and 18 U.S.C. § 2315. Appellant was sentenced to three concurrent terms of three years imprisonment, and is free on bail pending disposition of this appeal.

Appellant argues that the trial court erred in denying appellant's motion to suppress certain cartons of stolen stereo equipment and false exculpatory statements appellant made to an FBI agent. We affirm Judge Duffy's denial of appellant's suppression motion substantially for the reasons stated in the judge's opinion. 522 F. Supp. 970 (S.D.N.Y. 1981). Appellant also claims that the prosecutor's brief remarks about informants in rebuttal violated appellant's due process right to a fair trial. However, counsel for a co-defendant initially raised the informant issue, despite the judge's instructions not to do so. Moreover, the jury's acquittal of this co-defendant indicates that

the jury was not prejudiced by the prosecutor's brief remark. Under all the circumstances, we do not think that the prosecutor's remark in rebuttal requires reversal. Also, we find appellant's claim that his conviction was not supported beyond a reasonable doubt to be without merit. In light of the record and taking the view most favorable to the government on appeal, there was substantial evidence to support the jury's verdict.

Appellant's final claim is that the indictment should have been dismissed on speedy trial grounds. However, in the absence of more specific findings on this issue from the trial judge, we will refrain from deciding whether appellant's speedy trial rights were denied. While the Speedy Trial Act mandates that a defendant be tried within a certain time frame, it also provides for a number of "excludable time periods." See 18 U.S.C. § 3161 (West Supp. 1982). Although Judge Duffy apparently did deny appellant's speedy trial motion, he did not give his reasons for doing so nor did he indicate whether, and to what extent, certain time periods were excludable from speedy trial computations. We therefore remand this portion of the case to Judge Duffy to make appropriate findings, upon the record as it now stands or, in his discretion, upon receipt of further evidence. Should either party appeal from Judge Duffy's further findings and holding with respect to appellant's speedy trial claim, this panel will hear the appeal, if practicable.

The judgment of the district court is affirmed in part, and the case is remanded in part in order to allow the dis-

trict court to consider the speedy trial issue in accordance with this order.

/s/ WILFRED FEINBERG

WILFRED FEINBERG
Chief Judge

/s/ JAMES L. OAKES

JAMES L. OAKES

/s/ RALPH K. WINTER

RALPH K. WINTER
Circuit Judges.

A TRUE COPY

A. DANIEL FUSARO, CLERK

By /s/ FRANCIS X. GIUDHART

CHIEF DEPUTY CLERK

Memorandum of the District Court With Findings on Speedy Trial Issue, After Remand

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

S 80 Cr. 0587 (KTD)

UNITED STATES OF AMERICA,

v.

VINCENT CHARLES PITEO,

Defendant.

MEMORANDUM

APPEARANCES:

HON. JOHN S. MARTIN, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States of America
One St. Andrew's Plaza
New York, New York 10007
Of Counsel: Michael E. Norton, Esq.
Assistant U. S. Attorney

DAVID S. MICHAELS, ESQ.
Attorney for Defendant
250 Broadway
New York, New York 10007

KEVIN THOMAS DUFFY, D.J.:

On October 13, 1981 defendant Vincent Charles Piteo was found guilty after a jury trial of Counts One, Two and Four of S 80 Cr. 587 (KTD). Mr. Piteo was sentenced on March 22, 1982 to a three year concurrent term of imprisonment on each of the three counts. This conviction was appealed. On October 4, 1982 the Court of Appeals for the Second Circuit remanded the case for "appropriate findings" on my denial of Piteo's motion to dismiss the indictment for violation of the Speedy Trial Act. The delay in making the requested findings was occasioned by the difficulty in obtaining new counsel for Piteo and the necessity of new counsel familiarizing himself with the matter. This Memorandum constitutes my findings.

Mr. Piteo was arraigned and pled not guilty on the original indictment on September 25, 1980. Defendant Lewis Edward Wright was also arraigned on this date. A not guilty plea was entered on his behalf.[1] The Speedy Trial Act requires that trial on the indictment begin seventy (70) days after arraignment or December 4, 1980. *See* 18 U.S.C. § 3161(c)(1). At a pretrial conference held on October 17, 1980, defendant Piteo was granted his request for three (3) weeks to file motions and a December 15, 1980 trial date. Because the defendants' requested trial date was beyond the seventy day limit, Piteo waived his objections on the record to a speedier trial.

On November 16, 1980, defendant Piteo filed his pretrial motions. Three days later, a superseding indictment was filed adding Piteo's sister, Mildred Piteo, as a defendant. This new indictment triggered an exclusion under the Speedy Trial Act that allowed for a "reasonable period of

1. Defendant Wright was found not guilty.

delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run . . . ." 18 U.S.C. § 3161(h)(7). Therefore, in computing the Speedy Trial time for Mr. Piteo, I must determine Mildred Piteo's Speedy Trial time and then determine if the delay of Vincent Piteo's trial was reasonable.

Ms. Piteo was indicted on November 19, 1980, and plead not guilty at her arraignment on November 21, 1980. On that same date, I granted a continuance pursuant to 18 U.S.C. § 3161(h)(6). At her arraignment, all defendants were notified that pretrial motions were due by December 12, 1980. On that date, Mildred Piteo moved to dismiss the indictment and to suppress evidence. Memoranda and affidavits in support of and in opposition to these motions were filed up until January 30, 1981. Hearings began on both Piteos' suppression motions on March 10, 1981. The hearing was adjourned until May 4, 1981 due to the actual engagement of Mildred Piteo's counsel elsewhere. Decision was reserved and after both counsel stated their desire and intent to submit post-hearing memoranda, the following Monday was set as a deadline for submissions. Vincent Piteo filed his brief on May 29, 1981. Mildred Piteo never filed a post-hearing brief nor notified Chambers that a brief would not be submitted. On September 3, 1981 defendants' motions to dismiss the indictment, to suppress evidence and to inspect grand jury minutes were denied. A pretrial conference was held on September 9, 1981 at which time I set a trial date of September 28, 1981. On September 15th, defendant Wright moved to dismiss the indictment for violations of the Speedy Trial Act. Piteo joined in this motion. These motions were denied on the morning of trial. Trial began on September 28, 1981 and ended with the return of a verdict on October 13, 1981.

Mildred Piteo went to trial approximately one year or 311 days after the entry of her not guilty plea. This violates the Speedy Trial Act mandate that one must be brought to trial within seventy days of the not guilty plea unless time is properly excludable from Speedy Trial calculations. 18 U.S.C. § 3161(c). I have reviewed the record in this case, however, and find the following time period excludable:

Time Period	*Number of Days Excluded*	*Reason*
September 13, 1980 through September 3, 1981	264	18 U.S.C. §§ 3161(h)(1)(F) & (h)(1)(J)

The entire period of time from the date Mildred Piteo filed her motions until I rendered my decision on September 3, 1981 is excludable. The suppression hearings that began on March 10 ended on May 4, 1981 due to Mildred Piteo's lawyer's other obligations. Counsel for both Mildred Piteo and Vincent Piteo then requested time to file post-hearing briefs. The brief of defendant Vincent Piteo was filed over three weeks after the hearing concluded. Mildred Piteo's failure to file a brief precluded the motion from being considered "under advisement" and subject to the Speedy Trial Act's thirty (30) day limitations. 18 U.S.C. § 3161 (h)(1)(J). This result is consistent with *United States* v. *Bufalino*, No. 81-1474 (2d Cir. June 15, 1982). In *Bufalino*, the Second Circuit determined that subsection J is not invoked until the defendants "make their positions known in response to the motions that are made . . . ." *Id.* slip op. at 3302. This analysis is equally applicable here. The motion is not "under advisement" for speedy trial purposes until the defendants' responses are submitted. Mildred Piteo's

request for time to file a post-hearing brief indicated that it was necessary to supplement the existing record. My decision was rendered in September without the benefit of a brief on her behalf. In the future, the government should bring to the court's attention "a defendant's failure to respond to a motion within a reasonable time . . . ." *Id.* slip op. at 3303. In this case, the delay from the filing of pretrial motions and the resolution of these motions was reasonable and in compliance with the Speedy Trial Act. According to the computations, 264 days were excluded properly under the Speedy Trial Act. Thus, Mildred Piteo was brought to trial within 47 days of her not guilty plea and in compliance with the statute.

Having determined that Mildred Piteo's trial time had not run by September 28, 1981, I must now evaluate the reasonableness of the delay of Vincent Piteo's trial. Less than two months elapsed between the time Vincent and Mildred Piteo were indicted. Moreover, on October 17, 1980, less than one month after his arraignment, Vincent Piteo waived on the record his objections to the Speedy Trial Act to allow postponement of his trial to accommodate his counsel's schedule. It would be anomolous to hold now that the delay of trial for less than two months to allow for a joint trial with his co-defendant sister was unreasonable. It is also significant that Vincent Piteo never moved for a severance.

These above findings support my original decision to deny Vincent Piteo's motion to dismiss the indictment for violations of the Speedy Trial Act.

Dated: New York, New York
April 27, 1983

/s/ KEVIN THOMAS DUFFY

KEVIN THOMAS DUFFY, U.S.D.J.

Decision of the United States Court of Appeals for the Second Circuit Dated December 21, 1983, After Remand to the District Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 128—August Term, 1983

(Argued September 20, 1983

Decided December 21, 1983)

Docket No. 83-1155

UNITED STATES OF AMERICA,

Appellee,

v.

VINCENT C. PITEO,

Defendant-Appellant.

Before:

OAKES, VAN GRAAFEILAND and WINTER,

Circuit Judges.

Appeal from an order entered by the United States District Court for the Southern District of New York (Duffy, *Judge*) in connection with a denial of defendant's motion to dismiss an indictment on Speedy Trial Act grounds.

Affirmed.

DAVID S. MICHAELS, New York, New York, *for Defendant-Appellant.*

MICHAEL E. NORTON, Assistant United States Attorney, Southern District of New York (Rudolph Giuliani, United States Attorney, Barry A. Bohrer, Assistant United States Attorney, on the brief), *for Plaintiff-Appellee.*

WINTER, *Circuit Judge:*

Vincent Piteo appeals from an order entered after remand on his earlier appeal. In a trial before Judge Duffy and a jury, Piteo was convicted of three counts relating to the interstate transportation of stolen property. On appeal, all his claims of error, save one, were rejected by summary order and the case was remanded to Judge Duffy to make findings in connection with the denial of Piteo's pretrial motion to dismiss the indictment on Speedy Trial Act grounds. After reviewing Judge Duffy's findings, we affirm.

Under the Speedy Trial Act ("Act"), 18 U.S.C. §§ 3161 *et seq.*, a defendant's trial must begin within seventy days of the indictment or first appearance before a judicial officer, whichever occurs later. 18 U.S.C. § 3161(c)(1). The Act also provides for the exemption of certain periods from the computation of the allowable seventy days. 18 U.S.C. §§ 3161(h)(1)-(8). Certain of these exemptions are in issue here since Piteo's trial began more than a year after his speedy trial "clock" began to run.

Piteo was arrested on August 29, 1980 and presented before a United States Magistrate on the following day. He was indicted on September 19. In that Mr. Piteo's indictment occurred after his first appearance before a judicial officer, we conclude that his speedy trial "clock" began to run on the date of his indictment, *i.e.* September 19.

Fifty-eight of the allowable seventy days on that clock passed between September 19 and November 16, 1980, the date on which Mr. Piteo's counsel filed various pretrial motions, including a motion to suppress evidence. The filing of these motions suspended the running of his speedy

trial clock, for the statute excludes delays resulting "from any pretrial motion, from the filing of the motion through the date of the hearing on, or other prompt disposition of such motion." 18 U.S.C. § 3161(h)(1)(F).

On November 19, 1980, while Mr. Piteo's motions were still pending and the running of his clock was still suspended, a grand jury returned a superseding indictment against him. This indictment also named his sister, Mildred Piteo as a co-conspirator. The defendants were joined for trial. While the superseding indictment did not by itself affect Mr. Piteo's speedy trial clock, it is directly relevant to his appeal because the Act also excludes from the computation "[a] reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion for severance has been granted." 18 U.S.C. § 3161(h)(7). On November 21, at the arraignment of the Piteos on the superseding indictment, Judge Duffy set December 12 as the date on which pretrial motions should be filed in connection with the new indictment. Counsel for Ms. Piteo indicated that a conflict would prevent him from going to trial on December 15, the date originally set by Judge Duffy, but no new trial date was set.

Ms. Piteo filed her pretrial motions on December 12, including a motion to suppress similar to her brother's motion. This action caused her speedy trial clock to stop. Both Piteos filed various papers in connection with the pending motions through January, 1981.

The evidentiary hearing on the suppression motions began on March 10, 1981 and was continued until May 4 at the request of Ms. Piteo's counsel. At the conclusion of the hearing counsel for both Piteos requested and were

granted leave to file post-hearing memoranda. Mr. Piteo's counsel filed such a memorandum on May 29; Ms. Piteo's counsel never did, despite his announced intention. At no time during this period did counsel for either Piteo object to delays in bringing his client to trial.

Judge Duffy denied the Piteos' pending motions on September 3, 1981, thus causing the resumption of both speedy trial clocks. On September 15, Mr. Piteo, by motion, raised for the first time a speedy trial claim. This motion was denied without explanation on September 28, 1981, the date of the commencement of the trial. On October 13 the jury convicted Ms. Piteo on all five counts and Mr. Piteo on three of four counts. Mr. Piteo's appeal followed, resulting in an affirmance in all respects save the remand of his speedy trial claim.

On remand Judge Duffy relied upon the statutory provision excluding "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run." 18 U.S.C. § 3161 (h)(7). He construed the provision to mean that, in ruling on Mr. Piteo's speedy trial motion, he had first to calculate Ms. Piteo's speedy trial clock to determine whether she was brought to trial within the allowable seventy days. He found that her clock began to run on November 21, the date of her indictment, and was suspended on December 13, 1981, the day after her counsel filed the motions. After this initial passage of twenty-two days, Judge Duffy found that Ms. Piteo's clock did not resume until September 3, 1981, when he ruled on her motions. Judge Duffy excluded the entire intervening period by invoking two of the Act's exemptions: (1) 18 U.S.C. § 3161(h)(1)(F),

which excludes a reasonable period following the making of a motion for purposes of processing it, and (2) 18 U.S.C. § 3161(h)(1)(J), which excludes a period no longer than thirty days during which the court may take a motion under advisement. Judge Duffy noted that he never had Ms. Piteo's motion to suppress "under advisement" within the meaning given that term in *United States v. Bufalino*, 683 F.2d 638 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 727 (1983). *Bufalino* held that the advisement period begins once the court has everything it expects from the parties prior to making a decision. *Id.* at 642-44. Because Ms. Piteo's counsel never submitted the promised post-hearing memorandum, the advisement period as defined in *Bufalino* never began to run against Ms. Piteo, although Judge Duffy attributed an unspecified portion of the 264 days from December 13, 1980 through September 3, 1981, during which he was actually considering the pending motions, to the advisement period. The remainder of that period was in Judge Duffy's view excludable as the motion processing period of 18 U.S.C. § 3161(h)(1)(F) as construed in *United States v. Cobb*, 697 F.2d 38 (2d Cir. 1982). Judge Duffy further noted the passage of an additional twenty-five days on Ms. Piteo's clock from September 3 to September 28, when trial began. In sum, Judge Duffy concluded that Ms. Piteo was brought to trial after the lapse of but forty-seven days on her speedy trial clock, well within the statutory requirement.

Having concluded that Ms. Piteo was brought to trial within the requirements of the Speedy Trial Act, as defined by *Bufalino* and *Cobb*, Judge Duffy then assessed whether the delay in bringing Mr. Piteo to trial caused by the joinder

of his co-defendant sister was reasonable. Judge Duffy concluded that a delay of less than two months to permit a joint trial, especially given Mr. Piteo's failure to protest or seek severance, was reasonable.[1] Accordingly, Judge Duffy denied Mr. Piteo's motion.

We have previously held that in cases involving multiple defendants only one speedy trial clock, beginning on the date of the commencement of the speedy trial clock of the most recently added defendant, need be calculated under 18 U.S.C. § 3161(h)(7). *United States v. Barton*, 647 F.2d 224, 229 n.5 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981). In this computation, a delay attributable to any one defendant is chargeable only to the single controlling clock. *Id.* at 230 n.5; *United States v. McGrath*, 613 F.2d 361, 366 (2d Cir. 1979), *cert. denied*, 446 U.S. 967 (1980). So long as the defendants in question are brought to trial within the seventy speedy trial days that began with the clock of the most recently added defendant and so long as any delay is "reasonable," the Speedy Trial Act is not violated. This interpretation is completely consistent with the legislative history of the Speedy Trial Act, which indicates that "the purpose of [18 U.S.C. §3161(h)(7)] is to make sure that [the Act] does not alter the present rules of severance of defendants by forcing the government to prosecute the first defendant separately or be subject to a speedy trial dismissal motion." S. Rep. No. 1021, 93d Cong. 2d Sess. 38 (1974).

We conclude, therefore, that Judge Duffy was correct in focusing on Ms. Piteo's clock in ruling on Mr. Piteo's

1. How Judge Duffy concluded that Mr. Piteo's trial was delayed by less than two months is not clear. We calculate that Mr. Piteo's trial was delayed by two and a half months. *See infra*. The difference is not material however.

speedy trial motion.[2] We further conclude that Vincent Piteo's trial was not unreasonably delayed. Viewing the various times independently from his sister, Mr. Piteo's motion to suppress came under advisement on May 29, 1981. Taking his speedy trial clock into consideration alone, we find he should have been brought to trial by July 10, 1981—*i.e.* thirty advisement days plus his twelve remaining speedy trial days after his motion was under advisement. Delaying his trial until September 28 cannot be deemed unreasonable. A trial with his sister was clearly desirable and the delay was attributable to her motion to suppress. Since *Bufalino* imposes upon the government a prospective obligation to call to the court's attention the failure of defense counsel to submit a promised memorandum, 683 F.2d at 646, this precise situation cannot recur. Nevertheless, the events here preceded *Bufalino* and the delay in bringing Mr. Piteo to trial is allowable.

Affirmed.

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2. We do, however, express two reservations about his specific calculations: (1) Ms. Piteo's clock stopped on December 12, 1980, the date she filed her motions, not on December 13 as found by Judge Duffy; and (2) the period from September 15 to September 28 should have been excluded due to the pendency of Mr. Piteo's speedy trial motion.

Affirmation of Counsel for Petitioner, Joining in Motion of Defendant Lewis Edward Wright

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Cr. 587

(KTD)

UNITED STATES OF AMERICA

against

LEWIS EDWARD WRIGHT

Defendant.

BARRY IVAN SLOTNICK, an attorney-at-law, duly admitted to practice in the Courts of the State of New York, affirms the following under the penalties of perjury:

1. I have been retanied to represent Vincent Piteo wtih regard to his criminal matter pending before this honorable Court.

2. That I have read the Affidavit of Roland Thau, Esq. on behalf of defendant Lewis Edward Wright and the Affirmation of Michael L. Santangelo on behalf of Mildred Piteo in which they ask for relief dismissing the indictment herein pursuant to 18 U.S.C. Chapter 208 and Rule 48 (b) of the Federal Rules of Criminal Procedure.

3. That I have informed my client of the aforementioned application and am constrained to join in the aforesaid applications of Dismissal based upon his instruction.

/s/ BARRY IVAN SLOTNICK

BARRY IVAN SLOTNICK, P.C.

JAY L. T. BREAKSTONE
Notary Public, State of New York
No. 30-4525589
Qualified in Nassau County
Commission Expires March 30, 1982

Rule 48, F. R. Cr. P

(a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By Court. If there is unnecesary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

18 U.S.C. § 3161

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days

from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an

order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for

the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) the following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any de-

fendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the deefndant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot

be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such

action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section

3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in a indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

18 U.S.C. § 3162

§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the eivdence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty

or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in adition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

Amendment VI—Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

First Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

VINCENT CHARLES PITEO and LEWIS EDWARD WRIGHT,
Defendants.

COUNT ONE

The Grand Jury charges:

On or about the 29th day of August, 1980, in the Southern District of New York, VINCENT CHARLES PITEO and LEWIS EDWARD WRIGHT, the defendants, unlawfully, wilfully and knowingly did buy, receive and have in their possession goods and chattels, having a value in excess of $100, moving as and which were a part of and which constituted an interstate shipment of freight, express and other property, to wit: approximately 220 cartons containing radio, stereo and other component equipment of Sound Designs consigned from New Jersey to various consignees in other states, which had been embezzled, stolen, unlawfully taken, carried away, concealed and by fraud and deception obtained from a motortruck and vehicle and from a storage facility, platform and depot, knowing said goods and chattels to have been embezzled and stolen.

(Title 18, United States Code, Sections 659 and 2.)

COUNT TWO

The Grand Jury further charges:

On or about the 29th day of August, 1980, in the Southern District of New York, VINCENT CHARLES PITEO and LEWIS EDWARD WRIGHT, the defendants, wilfully and knowingly did transport and cause to be transported in interstate commerce from New Jersey to New York goods, wares and merchandise having a value in excess of $5,000, to wit: approximately 220 cartons containing radio, stereo and other component equipment of Sound Designs consigned from New Jersey to various consignees in other states, knowing the same to have been stolen, converted and taken by fraud.

(Title 18, United States Code, Sections 2314 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 29th day of August, 1980, in the Southern District of New York, VINCENT CHARLES PITEO and LEWIS EDWARD WRIGHT, the defendants, unlawfully, wilfully and knowingly did receive, conceal, store, barter, sell and dispose of goods, wares and merchandise having a value in excess of $5,000, to wit: approximately 220 cartons containing radio, stereo and other component equipment of Sound Designs consigned from New Jersey to various consignees in other states, moving as, and which were a part of, and which did constitute interstate commerce, knowing the same to have been stolen, unlawfully converted and taken.

(Title 18, United States Code, Sections 2315 and 2.)

[Illegible]
DEPUTY FOREPERSON

/s/ JOHN S. MARTIN, JR.
JOHN S. MARTIN, JR.
United States Attorney

First Superseding Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

S. 80 Cr. 587 (KTD)

UNITED STATES OF AMERICA

- v -

VINCENT CHARLES PITEO, MILDRED SOMMELLA PITEO and LEWIS EDWARD WRIGHT,

Defendants.

COUNT ONE

The Grand Jury charges:

1. From on or about August 21, 1980 up to and including August 29, 1980, in the Southern District of New York and elsewhere, VINCENT CHARLES PITEO, MILDRED SOMMELLA PITEO and LEWIS EDWARD WRIGHT, the defendants, and others to the Grand Jury known and unknown, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together and with each other to commit violations of Title 18, United States Code, Sections 659, 2314 and 2315.

2. The object of this conspiracy was for the defendants unlawfully, wilfully and knowingly to receive, conceal and

dispose of, for their own profit, valuable property that had been stolen, embezzled, converted and taken by fraud from goods shipped in interstate commerce. To this end:

(a) the defendants, unlawfully, wilfully and knowingly would and did buy, receive and have in their possession goods and chattels, having value in excess of $100 that were moving as, and were a part of and constituted an interstate shipment of freight, express and other property, which had been embezzled, stolen, unlawfully taken, carried away, concealed and by fraud and deception obtained from a motor-truck and vehicle and from a storage facility, platform and depot, knowing said goods and chattels to have been embezzled and stolen;

(b) the defendants, unlawfully, wilfully and knowingly, would and did transport, and cause to be transported in interstate commerce from New Jersey to New York goods, wares and merchandise having value in excess of $5000, knowing the same to have been stolen, converted and taken by fraud; and

(c) the defendants, unlawfully, wilfully and knowingly would and did receive, conceal, store, barter, sell and dispose of goods, wares and merchandise having value in excess of $5000, moving as, and which were a part of, and which did constitute interstate commerce, knowing the same to have been stolen, unlawfully converted and taken.

Overt Acts

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about August 29, 1980, defendant LEWIS EDWARD WRIGHT drove a tractor-trailer load of stereo equipment from New Jersey to New York, New York.

2. On or about August 29, 1980, defendant VINCENT CHARLES PITEO met defendant LEWIS EDWARD WRIGHT in the vicinity of 76 Thompson Street, New York, New York.

3. On or about August 29, 1980, defendant VINCENT CHARLES PITEO and LEWIS EDWARD WRIGHT unloaded cartons containing stereo equipment from a tractor-trailer parked in the vicinity of 76 Thompson Street, New York, New York.

4. On or about August 29, 1980, defendant VINCENT CHARLES PITEO told a Special Agent of the Federal Bureau of Investigation that he was not in possession of a bill of lading or any other document evidencing ownership of said stereo equipment, but that he could obtain such documentation "in a couple of days."

5. On or about August 29, 1980, defendant MILDRED SOMMELLA PITEO handed a partially filled-in form of uniform straight bill of lading to a Special Agent of the Federal Bureau of Investigation.

6. On or about August 29, 1980, defendant VINCENT CHARLES PITEO stated to a Special Agent of the Federal Bureau of Investigation: "I don't know nothing about nothing."

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges

On or about the 29th day of August, 1980, in the Southern District of New York, VINCENT CHARLES PITEO, MILDRED SOMMELLA PITEO and LEWIS EDWARD WRIGHT, the defendants, unlawfully, wilfully and knowingly did buy, receive and have in their possession goods and chattels, having a value in excess of $100, that were moving as, and were a part of and constituted an interstate shipment of freight, express and other property, to wit: approximately 220 cartons containing radio, stereo and other equipment of Sound Designs consigned from New Jersey to various consignees in other states, which had been embezzled, stolen, unlawfully taken, carried away, concealed and by fraud and deception obtained from a motortruck and vehicle and from a storage facility, platform and depot, knowing said goods and chattels to have been embezzled and stolen.

(Title 18, United States Code, Sections 659 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 29th day of August, 1980, in the Southern District of New York, VINCENT CHARLES PITEO, MILDRED SOMMELLA PITEO and LEWIS EDWARD WRIGHT, the defendants, unlawfully, wilfully and knowingly did transport and cause to be transported in interstate commerce from New Jersey to New York goods, wares and merchandise having value in excess of $5,000, to wit: approximately 220 cartons containing radio, stereo and other component equipment of

Sound Designs consigned from New Jersey to various consignees in other states, knowing the same to have been stolen, converted and taken by fraud.

(Title 18, United States Code, Sections 2314 and 2.)

COUNT FOUR

The Grand Jury further charges:

On or about the 29th day of August, 1980, in the Southern District of New York, VINCENT CHARLES PITEO, MILDRED SOMMELLA PITEO and LEWIS EDWARD WRIGHT, the defendants, unlawfully, wilfully and knowingly did receive, conceal, store, barter, sell and dispose of goods, wares and merchandise having value in excess of $5,000, to wit: approximately 220 cartons containing radio, stereo and other component equipment of Sound Designs consigned from New Jersey to various consignees in other states, that were moving as, which were a part of and which constituted interstate commerce, knowing the same to have been stolen, unlawfully converted and taken.

(Title 18, United States Code, Sections 2315 and 2.)

COUNT FIVE

On or about the 29th day of August, 1980, in the Southern District of New York, MILDRED SOMMELLA PITEO, the defendant, unlawfully, wilfully and knowingly, in a matter within the jurisdiction of a department and agency of the United States, to wit: The Department of Justice and the Federal Bureau of Investigation, did falsify, conceal and cover up by trick, scheme and device material facts and make false, fictitious and fraudulent statement and repre-

sentations and make and use false writings and documents, as set forth below, knowing the same to contain false, fictitious and fraudulent statements and entries:

Document	*Purported Date Of Document*	*False Statements*
Uniform Straight Bill of Lading	08/27/80	"Jersey City, N.Y." [*sic*] "08/27/80" "XYZ Trucking" "Consigned to Piteo" "Holding for Storage" "To Be Counted"

(Title 18, United States Code, Section 10001.)

/s/ JOHN P. DARCY
FOREPERSON

/s/ JOHN S. MARTIN, JR.
JOHN S. MARTIN, JR.
United States Attorney

Motion by Co-Defendant, Lewis Edward Wright, to Dismiss Indictment Pursuant to 18 U.S.C. § 3161, Rule 48, F. R. Cr. P. and the Sixth Amendment to the United States Constitution

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Cr. 587 (KTD)

UNITED STATES OF AMERICA

- v -

LEWIS EDWARD WRIGHT, *et al.*,

Defendants.

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of ROLAND THAU, sworn to September 15, 1981, and all the proceedings heretofore had herein, the defendant LEWIS EDWARD WRIGHT will move this Court before the Honorable Kevin T. Duffy, United States District Judge for the Southern District of New York, on September 22, 1981, for an order dismissing the indictment as to him on the grounds that he was denied a speedy trial in violation of the Sixth Amendment to the United States Constitution; the Speedy Trial Act, 18 U.S.C. Chapter 208 and Rule 48(b) of the Federal Rules of Crim-

inal Procedure and for such other and further relief as this Court might deem just and proper.

Dated: New York, New York
September 15, 1981

Yours, etc.,

CAESAR D. CIRIGLIANO, ESQ.
Federal Defender Services Unit
By: /s/ R. THAU

ROLAND THAU, ESQ.,
The Legal Aid Society
Attorney for Defendant Wright
2 Lafayette Street, Suite 510
New York, New York 10007
Tel: (212) 577-3415

To: JOHN S. MARTIN, JR., ESQ.,
United States Attorney
Southern District of New York
Attn: Michael E. Norton, Esq.,
Assistant United States Attorney

Affidavit of Roland Thau in Support of Motion to Dismiss Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Cr. 587 (KTD)

UNITED STATES OF AMERICA

-v-

LEWIS EDWARD WRIGHT, *et al.*,

Defendants.

State of New York)
County of New York) ss.:

ROLAND THAU, being duly sworn, deposes and says:

I am an attorney associated with the Federal Defender Services Unit of The Legal Aid Society and trial counsel to LEWIS EDWARD WRIGHT, one of the defendants herein, and make this affidavit in support of Mr. Wright's motion to dismiss this indictment as to him on the ground that he has been deprived of his constitutional and statutory right to a speedy trial in violation of the Sixth Amendment to the United States Constitution, 18 U.S.C. Chapter 208 and Rule 48(b) of the Federal Rules of Criminal Procedure.

Mr. Wright was arrested August 29, 1980. This indictment was filed September 19, 1980. September 25, 1980 Mr. Wright appeared by counsel in Part I of this Court,

where a plea of not guilty was entered. That appearance triggered the Speedy Trial Act which mandates that barring certain exclusions, the defendant must be tried within 70 days; 18 U.S.C. §3161(c)(1).

October 17, 1980, at a conference before the trial Judge, a trial date of December 15, 1980 was proposed. The government stated that December 15th, was beyond the Speedy Trial Act's 70 day mandate.

At that conference Mr. Wright's co-defendant announced his intention to file a motion to suppress, and on the understanding that trial would start December 15, 1980, Mr. Wright waived his Speedy Trial rights, since December 15th was approximately 90 days after time had begun to run on September 25, 1980.

Mr. Wright's waiver interrupted the running of the 70 day period after 22 days of it was consumed (September 25th to October 17th). The defendant did not file any pretrial motions but his co-defendant did. The Court held an evidentiary hearing on the co-defendant's motion to suppress. Evidence was heard March 10, 1981, and again May 4, 1981.

On September 1, 1981; 118 days after the completion of the evidentiary hearing, the Court denied the co-defendant's motion to suppress.

At a September 11, 1981 conference, trial was set to commence September 28, 1981. At that time the defendant Wright stated that he would file this motion.

ARGUMENT

At the time of the October 17, 1980 waiver, 22 days had run (September 25th to October 17th), leaving 48 non-excludable days to bring Mr. Wright to trial.

No compelling reason is known why the hearing on the co-defendant's motion was not started until March 10, 1981, nor why it was not resumed until May 4, 1981. The protracted history of the motion violates the "prompt disposition" provisions of 18 U.S.C. §3161(h)(1)(F).

As of May 4, 1981, the hearing on the motion to suppress was "under advisement" by the Court. 18 U.S.C. §3161 (h)(1)(J) excludes a maximum time of 30 days for such advisement. Thus the excludable time for decision on the co-defendant's motion to suppress stopped 30 days after the completion of the hearing, or on June 3, 1981, and the remaining 48 days within which Mr. Wright had to be brought to trial, started running once again on that day, and ran out July 21, 1981. The proposed trial date of September 28, 1981, is over 60 days past the last day on which the defendant Wright could be brought to trial. That computation credits probably excessive excludable time from October 17, 1980, to June 3, 1981.

WHEREFORE, it is respectfully prayed that this indictment be dismissed as to the defendant Lewis Edward Wright.

/s/ R. THAU

ROLAND THAU

Sworn to before me this
15th day of September, 1981.

/s/ MARGUERITE M. PIAZZA

MARGUERITE M. PIAZZA
Notary Public, State of New York
No. 41-4695164
Qualified in Queens County
Commission Expires March 30, 1983

Excerpts from Docket Entries, United States District Court for the Southern District of New York

OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

S 80 CR. 587 K.T.D. Vincent Piteo—1

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY Interval Section II (a)	Start Date End Date (b)	Ltr. Code (c)	Total Days (d)
3-10-81	Hearing held to suppress evidence. .adjd w/o date. . .KTD	3	3-10-81	E	1
3-12-81	Fld. Govts memorandum in support of admissibility of statements. .				
5- 4-81	Hearing cont'd. & concluded. .Decision Reserved. . .KTD	3	5-4-81	G	30
5-29-81	Fld. memorandum of law. .		6-2-81		days
6-11-81	Filed Transcript of record of proceedings, dated 3-10-81				
9- 3-81	Fld Opinion #52042. . .Defts motions to suppress evidence, to suppress statements, to dismiss indictments & for inspection of grand jury minutes are all denied. . .Duffy, J. m/n				

LETTER CODE

For Identifying Periods of Excludable Delay Per 18 U.S.C. 3161(h)

A. Examination or hearing for mental or physical incapacity (18 U.S.C. 4244).

B. NARA Examination (28 U.S.C. 2902).

C. State or Federal trials on other charges.

D. Interlocutory Appeals.

E. Hearings on pretrial motions.

F. Transfers from other districts (per F.R.Cr.P. Rules 20, 21 & 40).

G. Defendant Motion is actually under advisement. Period of up to 30 days is excludable per 3161(h)(1)(G).

18 U.S.C. § 2315

§ 2315. Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country.

18 U.S.C. § 659

§ 659. Interstate or foreign shipments by carrier; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such

baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment

shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.

18 U.S.C. § 371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

END OF DOCKET